

It was stipulated that claimant suffered accidental injury arising out of and in the course of her employment on December 18, 2000. It was also undisputed that claimant suffered injury to her right knee. The disputed issue was the nature and extent of claimant's disability. Specifically, whether claimant also suffered permanent injury to her low back as a result of her work-related injury.

The Administrative Law Judge (ALJ) noted the primary treating doctor's medical records did not indicate claimant complained of back pain until November 2001 and the doctor concluded those back symptoms were not related to claimant's work accident. The ALJ adopted that finding and limited claimant to a 10 percent functional impairment to the knee.

The claimant requests review of the nature and extent of claimant's disability, specifically whether she suffered a work-related back injury as well as the injury to her right knee. Claimant argues the contemporaneous medical records indicate she initially complained of hip and lower back pain as well as her knee complaints but thereafter treatment focused on her significant knee complaints. Consequently, claimant argues that she is entitled to a 5 percent impairment to the body as a whole due to her work-related back injury. She further argues the ALJ's award of a 10 percent knee impairment should be affirmed and combined with the 5 percent back rating for a final body as a whole impairment rating.

Respondent argues that Dr. Brett E. Wallace started treating claimant on January 17, 2001, for her injuries suffered in the work-related accident and it was not until November 19, 2001, that claimant made a complaint of back pain. The doctor concluded claimant's back complaints were not related to her work accident. Respondent argues the treating doctor's opinion should be adopted and the ALJ's Award should be affirmed except that claimant's impairment to her knee should be reduced to 5 percent.<sup>1</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed by respondent as the kitchen manager at Wanamaker Elementary School. On December 18, 2000, the claimant was walking across the parking lot to her car when she stepped on a patch of ice and fell. Claimant fell on her buttocks and felt immediate pain in her back and knee.

The claimant reported the accident the next morning and respondent sent her for treatment with Dr. Dick Geis. Claimant complained of knee, hip and low back pain. Claimant notes she was provided a knee brace. At a follow up visit with Dr. Geis on December 26, 2000, the doctor's medical notes indicated claimant's right hip pain was resolving.

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<sup>1</sup> As noted in the ALJ's Award, in its submission brief to the ALJ the respondent argued claimant should be limited to a 10 percent impairment to the knee based upon the opinion of the treating physician, Dr. Brett E. Wallace.

Respondent then referred claimant to Dr. Brett E. Wallace for additional treatment. Claimant first saw Dr. Wallace on January 17, 2001. Claimant testified that she went to seek treatment for her back and knee but because her knee was causing her more problems the doctor focused on her knee and did not pay any attention to her back. Dr. Wallace testified that claimant never made any back complaints to him until November 19, 2001.

Ultimately, on March 5, 2001, Dr. Wallace performed an arthroscopy with chondroplasty of the patella of claimant's right knee. On March 22, 2001, claimant began a regime of physical therapy which continued through April 13, 2001. The physical therapy notes do not indicate claimant made back complaints.

However, claimant testified that she had constant, sharp shooting pain in her back after the accident. And when she finally went back to Dr. Wallace with her back complaints he x-rayed her back but did not provide any treatment. However, Dr. Wallace's medical records indicate that he not only took x-rays but also ordered that an MRI and EMG testing be performed. Upon receipt of the test results the doctor recommended epidural steroid injections.

But claimant testified that respondent's insurance carrier told her that her back injury was not related to her work accident and additional treatment would not be provided for that condition. Claimant then began treatment with her personal physician for her continuing back complaints.

Claimant complained that she still has swelling, grinding and pain in her right knee as well as constant low back pain. She also noted that she suffered a non-occupational injury when she fell and fractured her right ankle on October 10, 2002. She was placed in a cast for six weeks as a result of that injury.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>2</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>3</sup>

Claimant alleged that when she first went to Dr. Wallace she discussed her back and that she has had a constant sharp pain in her back. But she agreed that at each office visit she did not complain of her back pain. And she agreed with Dr. Wallace's office

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<sup>2</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>3</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

notation that when she complained in November 2001, about her back she provided the doctor with a history of back pain of five months duration but did not relate her back pain to the slip and fall incident.

Dr. Wallace treated claimant beginning January 17, 2001, and was adamant that claimant never made back complaints until November 2001. And when she made the complaints he obtained an x-ray of her back and ordered an MRI as well as an EMG. Dr. Wallace concluded claimant's back complaints were not related to her injury at work in December 2000. Dr. Wallace opined claimant had a 10 percent permanent partial functional impairment to her right lower extremity based upon the *AMA Guides*<sup>4</sup>.

At her attorney's request, the claimant was examined by Dr. Peter V. Bieri on September 23, 2002. Dr. Bieri opined claimant suffered an 8 percent whole person functional impairment for her lumbar spine as well as a 5 percent whole person impairment for range of motion deficits of the lumbar spine. The doctor further opined claimant had a 5 percent permanent partial functional impairment to her right lower extremity. The doctor combined the impairments for a 15 percent permanent partial functional whole person impairment based upon the *AMA Guides*. But Dr. Bieri had been told by claimant that she had continued to complain of back pain after the accident.

The ALJ entered an order for Dr. Sergio Delgado to perform an evaluation of claimant. On February 25, 2003, Dr. Delgado performed a medical evaluation of claimant. The doctor opined claimant had a 5 percent functional impairment to her right lower extremity as a result of her work-related injury. The doctor rated claimant's lumbosacral strain under DRE, Lumbosacral Category II, for a 5 percent functional impairment to the whole person. But the doctor was equivocal regarding causation for the back impairment. He noted:

Similarly, on the basis of a diagnosis of a chronic lumbosacral strain which **could be related to the injury sustained and possibly aggravating** her previous degenerative arthritic complaints. . . . (Emphasis Added).

The ALJ noted that because Dr. Delgado's report was replete with qualified opinions it was not persuasive regarding the relation between claimant's back complaints and her work accident. The ALJ further noted that for approximately 11 months during which claimant received medical treatment, surgery and physical therapy for her knee injury she did not make complaints regarding her back. Claimant was released from treatment for her knee on April 13, 2001, and did not return to Dr. Wallace until November 19, 2001, with her first complaints to him regarding back pain. The failure to complain or seek treatment during that extended time period is inconsistent with her description of ongoing constant sharp shooting back pain.

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<sup>4</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

When claimant did complain of back pain to Dr. Wallace he immediately had diagnostic testing performed. This tends to corroborate his testimony that claimant did not complain of back pain while he was treating claimant's knee injury, because once he was apprised of a back complaint the doctor immediately ordered diagnostic tests to be performed.

The Board concludes that claimant's failure to complain of back pain during the time period from January 17, 2001, through November 19, 2001, while claimant received medical treatment, surgery and physical therapy for her knee injury refutes Dr. Bieri's opinion that the lumbosacral pain was caused by the work accident. Moreover, when claimant did complain to Dr. Wallace regarding her back pain she noted it was of five months duration. She did not relate it back to the work accident even though she testified she had constant back pain after the accident. Consequently, the Board concludes claimant has not met her burden of proof to establish that her back condition was caused or aggravated by her work accident.

The Board affirms the ALJ's determination claimant suffered a 10 percent functional impairment to the lower extremity.

**AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated December 8, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Paul D. Post, Attorney for Claimant  
John M. Graham Jr., Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director